IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1960

No. [redacted]

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

Respondents.

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,

Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, Board of Education of the City of Los Angeles and Board of Education of the City of San Diego, pray that writs of certiorari issue to review the judgments of the Supreme Court of the State of California filed therein on January 24, 1961, rehear-

ings in which were denied by that Court on February 21, 1961. These cases, which were there consolidated for argument, involve identical questions, and are therefore treated in a joint petition.

CITATIONS TO OPINIONS BELOW

The opinions by a seriously divided majority of the Supreme Court of the State of California, reproduced in Appendix "A" to this petition, were filed in both cases on January 24, 1961. The opinion in the Los Angeles case is reported in 55 Adv. Cal. 170, and the opinion in the San Diego case is reported in 55 Adv. Cal. 190. The judgments are the last sentences of each opinion (R.23; Appx. 20-21A (Los Angeles), and R.34; Appx. 24A (San Diego)). The separate dissenting opinions in each case of three of the seven justices of the Supreme Court (Associate Justices White, Schauer and McComb) (R. 24-32 (Los Angeles) and R. 35-36 (San Diego)) are reproduced in Appendix "B" to this petition and are reported in 55 Adv. Cal. 185 (Los Angeles) and in 55 Adv. Cal. 191 (San Diego).[1]

The order of the Supreme Court of the State of California filed on February 21, 1961 in both cases, denying petitioners' joint petition for rehearing, with-

[1]Each of the dissenting opinions in each case incorporates the opinion of Mr. Presiding Justice Fox, speaking for a unanimous three justice court when these cases were pending before the District Court of Appeal of California, Second Appellate District, Division Two, reported in 5 Cal. Rptr. 215. These opinions, a necessary adjunct to a full consideration of these cases, are reproduced in full in Appendix "C" to this petition, and are also included as part of the certified record.

out opinion, but with three (Associate Justices White, Schauer and McComb) of the seven justices dissenting, is not reported and appears as the second last document in the certified record of the Supreme Court.

JURISDICTION

The judgment of the Supreme Court of the State of California in each case was entered on January 24, 1961 (R. 1 (Los Angeles), and R. 33 (San Diego)). A timely joint petition for rehearing in that Court was denied in both cases by a joint order of the Supreme Court of the State of California filed on February 21, 1961 (R. 39, (Los Angeles), and R. 39, (San Diego)). This Court has jurisdiction under United States Code, Title 28, Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution insofar as it is made applicable to the States by the Fourteenth Amendment to the United States Constitution, prevents the State of California from requiring that applicants seeking the use of public school facilities furnish a "statement of information" advising that to the best of the applicant's knowledge (1) that the organization which will use the school property will not use it for any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the

Government of the United States by force or violence, and (2) that the organization which will use the school property does not advocate the overthrow of the Government of the United States or of the State of California by force, violence or other unlawful means and is not a communist-action or communist-front organization required by law to be registered with the United States Attorney General.

2. Whether the California statute authorizing the disclosure to school authorities of the information required by the "statement of information", set forth in question No. 1, *supra,* as here interpreted by the Court below, imposes an unconstitutional prior restraint on the protection afforded by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment to the United States Constitution.

3. Whether the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment to the United States Constitution, as here applied to petitioners, prevents a limited inquiry by the State into the background and bona fides of those seeking the use of school property, thus effectively obstructing the investigation that school officials must make in order to insure that school facilities will not be used for illegal purposes.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

California Education Code, Sec. 16564 (Cal. Stats. 1959, ch. 2, Based on former Cal. Ed. Code, Sec. 19440, as added by Cal. Stats. 1951, ch. 767, p. 2259) in relevant part provides:

> "Any use, by any individual, society, group or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered."

California Education Code, Sec. 16565 (Cal. Stats. 1959, ch. 2. Based on former Cal. Ed. Code, Sec. 19441, as added by Cal. Stats. 1951, ch. 767, p. 2260, amended by Cal. Stats. 1953, ch. 880, sec. 1, p. 2235) in relevant part provides:

> "No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.
>
> "For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

"STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means:

"That.....the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

The First and Fourteenth Amendments to the United States Constitution are also involved herein and are set forth in relevant part in Appendix "D" to this petition.

STATEMENT OF THE CASE

1. Proceedings In The Courts Below.

Respondents American Civil Liberties Union of Southern California (hereinafter termed "A.C.L.U.") made separate applications to the Board of Education of the City of Los Angeles and to the Board of Education of the City of San Diego for permission to use certain public school buildings in those cities in which to hold a series of monthly meetings which would be open to the public.[Fn] California Education Code Section 16565, implementing Section 16564 of the same Code, requires that applicants seeking the use of school property must execute and deliver a statement of information signed by a member of the organization seeking the use, stating under penalty of perjury and to the best of the applicant's knowledge, that the school property will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish forceful overthrow of the Government of the United States and that the organization on whose behalf he is making application does not advocate the forceful overthrow of organized government and that the organization is not a communist-action or communist-front organization required by law to be registered with the United States Attorney General. Their application in each instance was denied by the respective school boards because each applicant

[Fn] The State of California permits such use of school property for public purposes. (Calif. Education Code, Sections 16551-16566)

failed and refused to furnish the "Statement of Information."

Thereafter, the A.C.L.U. in two separate original proceedings applied to the Supreme Court of California for writs of mandate, demanding that that organization be allowed to use certain public school buildings in the City of Los Angeles and the City of San Diego without subscribing to the "Statement of Information" on the grounds that Sections 16564 and 16565 of the Education Code were unconstitutional under the First and Fourteenth Amendments to the Federal Constitution and Article I, Sections 9 and 10 of the State Constitution.[Fn]

The California Supreme Court transferred both cases to the District Court of Appeal, Second Appellate District for hearing, which Court issued alternative writs of mandate in both cases. After consolidated hearings, the District Court in two unanimous written decisions discharged the alternative writs of mandate (Appendix "C," 36C (Los Angeles), and Appendix "C," 37C (San Diego)), thus upholding the right of school boards to inquire, to the limited extent set forth by statute, into the background and bona fides of the

[Fn] Article I, Sections 9 and 10 of the Constitution of the State of California are counterparts to the First Amendment to the Federal Constitution, and provide in pertinent part as follows:

> Sec. 9, Article I: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . ."
>
> Sec. 10, Article I: "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

organizations requesting the use of school premises. (See: Appendix "C")

The Supreme Court of the State of California granted hearings in both cases and thereafter by a narrow four to three margin held in favor of the A.C.L.U. in both cases. Indicating that the basis for the refusal of the A.C.L.U. to furnish the prescribed "Statement of Information" was a claimed abridgment of both the state and federal constitutional guarantees of freedom of speech and assembly (R. 3, 3A (Los Angeles), and R. 33, 23A (San Diego)), the California Supreme Court held unconstitutional that portion of Section 16565 of the Education Code that requires the applicant to state that, to the best of his knowledge, the organization on whose behalf the application is being made does not advocate unlawful overthrow of the government and is not, to the best of applicant's knowledge, an organization required by law to be registered with the Attorney General of the United States. Relying heavily on this Court's holding in *De Jonge v. Oregon*, 299 U.S. 353 and on its own decision in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, which case held unconstitutional an earlier version of Section 16565, the Court reasoned that this portion of the State statute was aimed at preventing certain proscribed organizations from holding public meetings while allowing all others to do so, and as such was an unconstitutional encroachment on the right of free speech and assembly. (Appx. "A," 9A)

The Court indicated that despite Federal and State legislative findings to the contrary regarding the nature and objective of the Communist conspiracy, the school authorities had not shown that a "clear and present danger" to the community would exist if Communists or Communist affiliates were permitted to hold public meetings in public schools. The Supreme Court further held that Section 16564 of the Education Code set up an unconstitutional power of prior restraint upon the preferred rights of freedom of speech and assembly guaranteed by the Constitution.[Fn] (Appx. "A," 18A)

2. Presentation of Federal Questions In The State Courts.

Supreme Court of the State of California. In their original applications[Fn] for Writs of Mandate to the State Supreme Court, the A.C.L.U. argued that the requirement that they subscribe to the "Statement of Information" as set forth in the Education Code is unconstitutional because it abridges freedom of speech and of assembly in violation of the federal and state constitutions, and that no "clear and present danger" to the community as that phrase was construed by this Court in *Dennis v. United States,* 341 U.S. 494, and *Yates v. United States,* 354 U.S. 298, is shown in these

[Fn] Not material here is the fact that the Supreme Court also determined that the issues presented by these cases were not moot. (Appx. "A", 20A)

[Fn] A complete certified set of the briefs of all parties in both cases as well as the briefs of Amicus Curiae American Jewish Congress and Amicus Curiae Friends Committee on Legislation of Northern California has been filed with the Clerk of this Court.

cases; other constitutional points raised by the A.C.L.U. in their briefs were that the California statute deprived them of procedural due process of law as interpreted by this Court in *Speiser v. Randall*, 357 U.S. 513, and that the state statute further offends due process because its language is vague, indefinite and uncertain. (Petn. for Writ, p. 6, Memo. Pts. and Auth. p. 1, 9 and 19)

Petitioners[Fn.] answered these constitutional arguments, alleging that the Education Code requirements do not infringe upon areas of constitutionally protected speech and assembly since those areas are not protected absolutely (Pet. L.A. Ret. to Alt. Writ, p. 3) and that the interests of the public under the circumstances of this case, where the particular danger—overthrow of the government by force and violence—has been recognized on both the state and federal levels, far outweigh any competing private interests (Pet. L.A. Ret. to Alt. Writ, p. 6-9; Pet. S.D. Memo. Pts. and Auth., p. 9-13). Petitioners further contended in their briefs that the limited inquiry required by the statute did not offend procedural due process through a shifting of the burden of proof in the manner struck down by this Court in *Speiser v. Randall*, 357 U.S. 513. (Pet. L.A. Ret. to Alt. Writ, p. 9; Pet. S.D. Memo Pts. and Auth., p. 4) Amicus briefs filed on behalf of

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Fn Where separate briefs were filed in the Courts below by petitioners, briefs of petitioners Board of Education of the City of Los Angeles will be designated as "L.A." and briefs of petitioner Board of Education of the City of San Diego will be designated as "S.D."

the Friends Committee on Legislation of Northern California and on behalf of the American Jewish Congress each raised the federal constitutional issue that the Education Code sections impose a prior restraint on freedom of speech and assembly in violation of the First and Fourteenth Amendments to the Federal Constitution. (Friends, Memo. Pts. and Auth., p. 1-2; Br. Am. Jew. Cong. p. 4-8) This particular constitutional issue was specifically answered in separate briefs filed by petitioner (S.D.) who argued that the pubilc interest in the use of public schools far outweighs the limited scope of abridgment of First Amendment rights. (Resp. Reply to Am. Jew. Cong., p. 2-6; Resp. Reply to Am. Curiae, p. 2-11)

District Court of Appeal. The District Court of Appeal in its opinions specifically passed on the issue of whether the furnishing of a "Statement of Information" required under the California statute is an unconstitutional infringement upon the rights of free speech and assembly under the First Amendment to the Constitution of the United States and as guaranteed by the California Constitution. (Appx. "C," 3C, 9C) The District Court in holding the sections constitutional, relied almost exclusively on this Court's decisions in cases involving the First and Fourteenth Amendments to the Federal Constitution.

Supreme Court of California. The petition of the A.C.L.U. for hearing in the Supreme Court of California after an adverse decision in the District Court

again raised the issue that California Education Code Section 16565 violates state and federal constitutional guarantees of freedom of speech and assembly. (Pet. for Hearing, p. 4-9) As well, the petition for hearing raised the constitutional issue that the Education Code section violates procedural due process of law under this Court's decision in *Speiser*, supra. (Pet. for Hearing, p. 9-13) These points were specifically controverted in a brief filed by petitioner L.A. (L.A. Answer to Pet.)[fn] The decision of the Supreme Court of California presented the issue of the cases as whether the "Statement of Information" prescribed by the Education Code "abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, § 9, 10)." (Appx. "A," 3A)

REASONS FOR GRANTING WRIT

The Supreme Court of the State of California has here decided fundamental issues involving First Amendment rights of free speech and assembly which are of major significance to all school officials in the State of California and of importance to all potential users of public school property. The facts of these cases present novel questions regarding the extent to which a State may go in determining what use may be made of school property controlled by it. The issues of these

[fn] A letter brief submitted by petitioner S.D. answering these points was received and considered by the Supreme Court prior to the rendering of its decision. While this brief was not filed with the Court below as part of the record, a copy is being filed with the Clerk of this Court.

cases as here construed and applied have not heretofore been definitively determined by this Court. Further, the decision by the State Court appears to have misinterpreted the principles and doctrines laid down by this Court and in so doing restricted the area of legitimate inquiry by the State as to beliefs and convictions of those seeking to make use of public schools for public meetings.

I.

IN LABELING AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH AND ASSEMBLY, THE LIMITED INQUIRY BY THE STATE INTO THE CHARACTER AND NATURE OF ORGANIZATIONS SEEKING TO USE PUBLIC SCHOOLS, THE SUPREME COURT OF CALIFORNIA HAS MISAPPLIED THAT PRINCIPLE AS ESTABLISHED BY THIS COURT.

In a series of decisions considering the nature of the protection afforded individuals by the First Amendment rights of free speech and assembly as made applicable to State action by the Fourteenth Amendment, this Court has never considered those rights to be absolute.[Fn] (See: *Near v. Minnesota*, 283 U.S. 697; *Whitney v. California*, 274 U.S. 357; *Times Film Corp. v. Chicago*, ... U.S. ....., 5 L. Ed. 2d 403; *American Communications Assn. v. Douds*, 339 U.S. 382)

[Fn] In this regard it should be noted that the Court below refers to First Amendment rights as occupying a "paramount and preferred" place in law. (R. 16, Appx. "A" 15A, 19A) As pointed out by Mr. Justice Frankfurter in his concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, this concept has never commended itself to a majority of this Court.

The test applied in those cases where official action is in conflict with First Amendment rights is whether such action is justifiable on the basis of a superior or supervening governmental interest to which individual rights must yield. (*Barenblatt v. United States*, 360 U.S. 109; *Uphaus v. Wyman*, 360 U.S. 72; *Times Film Corp. v. Chicago*, supra.)

Obviously, the use to which school property will be put is of valid concern to the State, for it is inconceivable that the State can be said to have no interest in assuring itself that schools will not be used as a convenient "community center" for subversive activity. Under its police power and under its power to protect itself from subversion, the use of school property for such inimical purposes may be regulated, since school property unlike streets and parks, has never "immemorially been held in trust for the use of the public." (cf. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 at 515)

While the State is not obligated to furnish school facilities to the public, (*Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536) the Legislature of the State of California has authorized school property to be used for civic center purposes. (Calif. Education Code, Secs. 16551-16566.) Within these provisions it has imposed certain narrow requirements that the use be for certain public purposes and that the use be not by organizations which advocate the forceful overthrow of organized government nor for acts intended to overthrow

the government by force and violence. These prohibitions are buttressed by legislative findings that a world-wide revolutionary movement to establish a totalitarian dictatorship exists, that the objectives of this movement are inimical to organized government, and that from this movement a clear and present danger which is great and imminent exists to threaten the State. (Calif. Gov. Code, Sec. 1027.5, Appx. "A," 9A, Appx. "C," 8C) Relying on these findings, the Legislature has delegated to the governing boards of the local school districts the duty of investigating and determining when use of school property should be denied. The governing boards of the local school districts in Los Angeles and in San Diego, in their efforts to enforce this legislative mandate, require applicants for use of school property to furnish the statement of information required by Section 16565 of the California Education Code.

The State Court based its conclusion that the disclosure of information required by the statute was unconstitutional by holding that disclosure of Communist Party membership has no reasonable tendency to prove that the forbidden acts would be committed in public meetings. (Appx. "A" 18A). By so doing the State court erred, fundamentally, we believe, by failing to give any legitimacy whatsoever to the legislative findings regarding the nature and objectives of the Communist conspiracy. (Appx. "B," 4B) Thus the California court set up the "paramount and preferred rights" of speech and assembly on one side of the scale of social

values without considering as a countervailing balance the State's interest in protecting itself against what the State has found Communists and their affiliates *have done* in the past and are *likely* to do again. (Appx. "B," 2B).

In *Gitlow v. New York*, 268 U.S. 652, this Court decided that determinations by a state legislature concerning utterances advocating the overthrow of organized government by force, violence or other unlawful means must be given great weight and every presumption must be indulged in favor of the validity of the statute. In *Dennis v. United States*, 341 U.S. 494, this Court held that organized government need not wait until after its foes have struck to take action to protect itself, and with respect to determinations made by a state legislature that a certain kind of speech was, itself, harmful and unlawful, ". . . (T)he constitutionality of such a state statute had to be adjudged (on the grounds of) whether the statute was reasonable." (*Id.* 506) (Brackets added). It is of course, entirely reasonable for a State to attempt to protect itself from violent overthrow. (*Dennis v. United States,* supra, cf. *Konigsberg v. State Bar of California,* ..... U.S. ....., 29 L.W. 4341)

Prior inquiry by school officials into the potential use of school property and the character of the applicant requesting such use is a sphere of legitimate governmental concern. (cf. *Barenblatt v. United States*, supra, *Speiser v. Randall*, 357 U.S. 513, *American Communications Assn. v. Douds*, supra)

The Legislature of the State of California has weighed the competing interests at stake and has resolved them in favor of permitting a restricted inquiry in this limited area.[Fn] This Court has in other similar instances resolved competing interests of government vis-a-vis individuals in favor of the government's right to protect itself. In *Konigsberg v. State Bar of California,* supra, this Court stated at 4346: "Nor is the state interest in this respect insubstantially related to the right which California claims to inquire about Communist Party membership. This Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes. (Citations)."

In the light of this legitimate concern of the State in this area, the inquiry made by school officials certainly has a substantial relevance thereto. (See *Barenblatt v. United States,* supra, *Uphaus v. Wyman,* supra) The investigation made is limited to finding out whether or not the organization seeking the use of the schools intends to commit the proscribed acts of overthrow of the government, advocates such overthrow, or is required by law to be registered with the Attorney General of the United States. If an organization answers this inquiry in the affirmative, it is highly probable

[Fn] Compare the restricted inquiry made here with the broadgauge inquiry by state officials struck down by this Court in *Shelton v. Tucker,* ... U.S. ..... 5 L. Ed. 2d 231.

that such organizations will commit the proscribed acts. All of the required information is therefore vital to an advance determination by school boards as to whether or not acts of overthrow, as contra-distinguished from mere doctrinaire discussion of principles, (cf. *Yates v. United States*, 354 U.S. 298) will be committed on school premises.

It is submitted that the decision of the Court below in holding such a limited inquiry by the State a violation of the Constitution of the United States jeopardizes the State's power to make legislative determinations and investigations which this Court has recognized as valid.

II.

BY ALLOWING APPLICANTS FOR PRIVILEGES CONFERRED BY THE STATE TO REFRAIN FROM ANSWERING MATERIAL INQUIRIES WHICH ARE A MATTER OF LEGITIMATE AND SUBSTANTIAL CONCERN TO THE STATE, THE SUPREME COURT OF CALIFORNIA UNNECESSARILY RESTRICTS THE INVESTIGATORY POWERS OF THE STATE, DESTROYING RIGHTS WHICH THIS COURT HAS SAID HAVE BEEN PRESERVED TO THE STATE.

A person desiring to remain silent and invoke the privilege of the First Amendment, as made applicable

to a State by the Fourteenth Amendment is, in certain instances,[Fn.] within his rights in so doing. But where the State holds out a privilege or a benefit to an individual, on consideration that the individual make known the use to which the benefit is to be put, [Fn.] he may not then invoke his constitutional right to remain silent and still expect to have the benefits conferred upon him. This Court has so held in numerous decisions: *Garner v. Board of Public Works,* 341 U.S. 716 (an applicant for public employment was not privileged to remain silent and refuse to subscribe to an oath relating to knowingly belonging to the Communist party in the recent past, and still accept public employment); *Gerende v. Board of Supervisors,* 341 U.S. 56 (a candidate for public office may not refuse to file an affidavit that he is not a subversive person and still be privileged to appear on an election ballot); *American Communications Assn. v. Douds,* 339 U.S. 382 (a labor union official may not refuse to file an affidavit declaring his nonaffiliation with the Communist party and his nonbelief in forceful overthrow of organized government and preserve to his union the privilege of using the facilities provided by the National Labor Relations Act): *Barenblatt v. United States,* 360 U.S. 109 (a person may not invoke the First Amendment

[Fn] Where as here the person asserts *only* First Amendment—not Fifth Amendment—rights, the test of applicability of those rights stand on grounds different from those where Fifth Amendment rights alone are asserted. (*Barenblatt v. United States,* 360 U.S. 109; See: *Quinn v. United States,* 349 U.S. 155.)

[Fn] It is to be emphasized here that the information required is not of every potential use to which the premises may be put, but that only that the premises will not be used for certain delineated illegal acts of overthrow. (Cf. *Shelton v. Tucker,* .... U.S. .... 5 L. Ed. 2d 231)

and refuse to answer inquiries reasonably related to a valid legislative purpose); *Konigsberg v. State Bar of California*, ... U.S. ....., 29 L.W. 4341, and *In re Anastaplo*, ... U.S. ....., 29 L.W. 4355 (applicants for admission to State Bars may not refuse to answer pertinent inquiry and still be admitted to professional practice). Each of these cases recognize the right of the individual to remain silent by invoking the First Amendment. If a privilege hinges on disclosure however, that privilege may be denied unless the applicant is willing to speak. If a supervening valid legislative inquiry is involved, that privilege must give way.

Petitioners submit that the State Court did not follow this concept when it reasoned that the only way the State can prevent acts of overthrow is to do as the federal government has done in the Smith Act and make such acts criminal. (Appx. "A," 16A)

The Legislature of the State of California has the obligation to the citizens of the State to see that the tenets of democratic government are protected. Forceful overthrow of organized government is not within the framework of our democratic system. If citizens or organizations wish to make private forums available to persons or groups who intend to overthrow the government by force and violence, the State does not here prohibit them from so doing. However, the State has chosen to limit, to the limited extent available to it, the use of its public facilities by those which it has found and determined to be enemies of the State.

To determine whether the applicant will use school property for an overt act of overthrow or whether the group has as one of its beliefs the forceful overthrow of organized government the State has authorized local school officials to make an investigation of the applicant. The first part of the investigation is the required statement of information (Calif. Education Code, Sec. 16565) If the applicant furnishes the statement of information, the school board may need to make further inquiry. If the board finds that the statements contained therein are not true, and if they were knowingly made when untrue, the State may punish the applicant for perjury, with all the constitutional protections available to those charged with a crime. (*American Communications Assn. v. Douds,* 339 U.S. 382) This is the first step in the investigation of the applicant. If, however, at the threshold, the applicant fails and refuses to furnish this pertinent information, the investigatory powers of the school board are obstructed, and it can go no further with its investigation.

By denying use of school property to those who refuse to answer "we do not advocate the overthrow of your government" the State is in effect saying that those who refuse to answer this relevant question have obstructed the investigation of the governing board who must determine what use will be made of the property. The school board then has no alternative but to consider for the purposes of that application, that the questions posed are answered in a way unfavorable to the

party refusing to answer. (Cf. *Konigsberg v. State Bar of California*, supra.)

The decision of the Supreme Court of California, made without the guidance of this Court's recent decision in *Konigsberg*, supra, unnecessarily restricts the State's investigatory power over property under its direct control.

CONCLUSION

This petition should be granted because the Supreme Court of the State of California has decided questions under the Federal Constitution in a way which is inconsistent with the decisions of this Court. Of greatest importance is the fact that the State Court's decision if allowed to stand will greatly hamper the efforts of the State to make limited investigations into matters of legitimate and substantial governmental concern.

Petitioners pray that this Honorable Court grant the writs of certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California Corporation; EASON MONROE, Director and WILLARD CARPENTER, Associate Director, *Petitioners,*	)	L. A. 25788
vs.	)	
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, *Respondent.*	)	

Petitioners seek a writ of mandate to compel the Board of Education of the City of Los Angeles to grant their application for the use of the John Burroughs Junior High School Auditorium in which to hold a series of monthly public meetings on the general theme of "The Bill of Rights in 1960." Their application was denied by respondent board because petitioners refused to furnish the "Statement of Information" as required by section 16565 of the Education Code, which implements section 16564 of the same code (formerly §§ 19440 and 19441).

The pertinent portion of section 16564 reads: "Any use, by any individual, society, group, or organization for the commission of any act intended to further any program or movement the purpose of which is to ac-

complish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered." Implementing section 16565, as here material, provides: "No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

"For the purpose of determination by such governing board whether or not any individual, society, group, or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means;

"That ...., the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the

best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

Petitioners refused to furnish the prescribed statement primarily on the ground that such test oath requirement abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U.S. Const., Amendments I and XIV; Cal. Const., art. I, §§ 9, 10.)

The sections of the Education Code here under attack were obviously adopted in an attempt to meet the constitutional objections to the former section 19432 of the Education Code, which we held unconstitutional in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536. That section prohibited in express terms the use of the "civic center" in any school building by "any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of govern-

ment of the United States or of the State by force, violence, or other unlawful means." We held in Danskin (28 Cal. 2d pp. 545-546) that while "[t]he state is under no duty to make school buildings available for public meetings . . . [i]f it elects to do so . . . it cannot arbitrarily prevent any member of the public from holding such meetings . . . [n]or . . . make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property."

We further quoted from *De Jonge v. Oregon,* 299 U.S. 353: "The holding of meetings for peaceable political actions cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them

for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge. We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party." (28 Cal. 2d pp. 552-553.)

We concluded: "When one searches deeper for the reason that motivates the prohibition of such meetings, there is no escaping the conclusion that the Legislature denies access to a forum in a school building to 'subversive elements,' not because it believes that their public meetings would create a clear and present danger to the community, but because it believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate. What it does not tolerate it seeks to censor. (28 Cal. 2d p. 545.) . . . Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. (28 Cal. 2d p. 546.) . . . If it is unconstitutional for the state to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights of free speech and assembly at places where others are allowed to speak and assemble, it is *a fortiori* unconstitutional to require